

Opinion Letter MW-2009-04-12.21.09

December 21, 2009

Re: Applicability of G.L. c. 151 to employees compensated on a commission basis

I am writing in response to your request for the Division of Occupational Safety's ("DOS") written opinion regarding the applicability of G.L. c. 151, the Massachusetts Minimum Fair Wage Law, to retail employees paid on a 100 percent commission basis where the employee "on occasion . . . works random shift(s) in a different role in which the employee earns a base hourly rate plus a commission for sales that he/she makes during the shift." Specifically, you have asked two questions: [1] First, if the retail employee works more than forty hours in a given work week, is the employee entitled to overtime pay? If yes, what is the employee's regular rate for purposes of calculating overtime?

Analysis

Unlike the federal Fair Labor Standards Act (FLSA) which permits a limited exception to federal overtime requirements for certain "inside" salespersons, Massachusetts' law does not include any such exception. [2] Therefore, unless another overtime exemption applies, inside salespersons are subject to the state overtime law, even though the commissions they receive are not included in the regular hourly rate for purposes of overtime calculation. *See G.L. c. 151, §1A*. Accordingly, the answer to your first inquiry is "yes". The next question is, what is the overtime rate of pay to an "inside" salesperson?

Under Massachusetts' law, the employee must be compensated at a rate not less than one and one half times the regular rate at which he is employed for all hours worked in excess of 40 hours in a given workweek. *G.L. c. 151, §1A*. The Massachusetts' Minimum Wage Regulations, 455 C.M.R. §2.01 et seq., further define how overtime is calculated. Section 2.03(3) defines the overtime rate, in pertinent part, as "1½ times the employee's regular hourly rate, such rate not to be less than the basic minimum wage. Section 2.01 defines "regular hourly rate" as:

[t]he amount that an employee is regularly paid for each hour of work. When an employee other than an employee exempt from overtime under M.G.L. c. 151, § 1A, is paid on a piece work basis, salary, or any basis other than an hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total weekly earnings. Regardless of the basis used, whether time rate, commission basis or piece rate, an employee shall be paid not less than the applicable minimum wage each week. The regular hourly rate shall include all remuneration for employment paid to, or on behalf of, the employee, but shall not include: (a) sums paid as *commissions*, drawing accounts, bonuses, or other incentive pay based on sales or production; or (b) sums excluded under 29 U.S.C. §207(e). [3] (*emphasis added*).

Accordingly, in computing the overtime rate for an employee who is paid on a 100 percent commission basis, the employee's total earnings for purposes of overtime calculation must exclude commissions. However, pursuant to 455 C.M.R. §2.03(3), the employee's regular hourly rate must not be less than the minimum wage. These two provisions must be read harmoniously to effectuate a consistent body of law. *Com v. Matranga, 455 Mass. 45 (2009)*. A plain reading of the two provisions compels the conclusion that such an employee be paid at least the equivalent of minimum wage (currently \$8 per hour) for the first 40 hours, and time and one-half minimum wage (i.e., \$12 per hour) for all hours worked over 40 in a given workweek. An example is illustrative:

If an employee paid on a 100 percent commissions basis works 50 hours in a given work week, the employee's total compensation for that week must equal or exceed \$450.00 (\$320.00 [\$8 x 40 hours] + \$120.00[\$12 x 10 hours]).

If the same employee also works, for example, forty hours in the commission only position plus six additional hours in a different position that pays an hourly rate of \$10 per hour, plus commission, in calculating the overtime rate, the two rates would be "weighted" or "blended" so that the overtime

rate is the average of the two "regular" rates (\$8 per hour and \$10 per hour) based on the actual number of hours worked in each category, times one and a half $\{(\$8 \text{ per hour} \times 40 \text{ hours} = \$320.00) + (\$10 \text{ per hour} \times 6 = \$60.00) \div 46\} \times 1 \frac{1}{2} = \12.40 Accordingly, the total overtime would be $\$12.40 \times 6 \text{ hours}$. Of course, an employer must separately determine overtime compensation due under federal law.

Please note that this opinion is based solely on the information provided with your request. The existence of other facts not contained in your request might require a different conclusion. If you have any further questions, please feel free to contact me.

Sincerely,
Patricia A. DeAngelis
Legal Counsel

[1] Please note that employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder.

[2] Under 29 U.S.C. §207(i), overtime compensation is not required for retail or service employees "if (1) the regular rate of pay of such employee is in excess of one and one-half times the [statutory minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services."

[3] The definition of "regular hourly rate" was amended effective April 25, 2003, to incorporate the exemptions included in 29 U.S.C. § 207(e).